United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7533

United States Court of Appeals

FOR THE SECOND CIRCUIT

TRAVELERS INDEMNITY COMPANY,
Plaintiff-Appellee,

—against—

S. S. POLARLAND, her engines, boilers, etc.,
D/S A/S VESTLAND, RICH. AMLIE & CO. A/S,
& SEVEN SEAS SHIPPING CORP.,
Defendants.

S. S. POLARLAND,
Defendant-Appellee,

—against—

SEVEN SEAS SHIPPING CORP.,
Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT SEVEN SEAS SHIPPING CORP.

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ISSUES PRESENTED FOR REVIEW

1. Did the Court below err in concluding that defendant-appellant Seven Seas Shipping Corp. was the carrier of the allegedly damaged cargo?

2. Did the Court below err in concluding that defendant-appellant Seven Seas Shipping Corp. issued for its own account the bills of lading with respect to the allegedly damaged cargo?

3. Did the Court below err in concluding that defendant-appellant Seven Seas Shipping Corp. was liable for the alleged damage to the cargo?

4. Did the Court below err in concluding that the alleged damage to the cargo that appeared at off-loading was of a nature and source different from that noted at on-loading?

5. Did the Court below err in awarding attorney's fees to defendant-appellee S. S. Polarland?

We submit that the District Court erred in all of the above respects. If it did there must be a reversal. If the Court erred in some but not all of the above, there either must be a reversal or a remand to recompute the awards made.

PRELIMINARY STATEMENT

Appellant Seven Seas Shipping Corp. appeals from a decision of the Honorable Edward J. Weinfeld rendered August 17, 1976, reported at 418 F. Supp. 985 (S.D.N.Y. 1976).

STATEMENT OF THE CASE

A. Nature of the Case

This is an action by plaintiff-appellee, Travelers Indemnity Company ("Travelers"), as subrogee, for recovery of damage to steel coils shipped by Nimpex International, Inc. ("Nimpex"), which damage allegedly occurred during the shipment of the steel coils from Cleveland, Ohio to Antwerp, Belgium on the defendant-appellee, S. S. Polarland ("Polarland") (6a, 10a).* Travelers claimed that the damage was the direct result of the improper loading and stowage of the cargo which, it claimed, defendant-appellant, Seven Seas Shipping Corp. ("Seven Seas"), was under a duty to perform properly. The Polarland cross-claimed against Seven Seas for indemnity and reasonable counsel

* References to the joint Appendix are cited " a".

fees incurred by it in defending the *in rem* liability of the vessel (41a-51a).

B. Course of Proceedings

This action was commenced in September, 1972 by Travelers in the name of Nimpex (13a). The trial originally began on June 18, 1974. During the course of the first day's hearing, a motion was made to permit Travelers to be added as a party plaintiff. Thereafter, over the objection of Seven Seas, the motion was granted and Nimpex was removed as a party plaintiff. Ferrostaal A. G. ("Ferrostaal") was named originally as a party defendant, but was dismissed from the case in March, 1974 for lack of personal jurisdiction (73a).

In March, 1974 the Polarland filed and served its cross-claim against Seven Seas for indemnity and counsel fees.

The trial was adjourned after two days to permit further discovery. It was recommenced March 1, 1976.* The opinion of the District Court (Weinfeld, J.) was rendered August 17, 1976 and the Order and Judgment from which the appeal was taken was entered on September 20, 1976.

C. Disposition

Pursuant to a decision of the District Court (Weinfeld, J.) rendered August 17, 1976 (reported at 418 F. Supp. 985), an Order and Judgment (one paper) was entered on September 20, 1976 awarding plaintiff-appellee, Travelers, $41,136.35 (consisting of $27,862.13 in damages** plus in-

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* Rich. Amlie & Co. A/S was dismissed as a defendant on such day.

** The decision awarded Travelers $30,802.93 in damages. However, Travelers' counsel agreed that this amount failed to apply properly the $500 package limitation contained in the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 1304(5) (1970), and the final judgment was reduced accordingly.

terest and costs) and defendant-appellee, Polarland, $10,000 as "reasonable counsel fees incurred in the defense of the action" (527a, 532a).

D. The Facts

1. *Background.* Nimpex purchased from Sharon Steel Corporation ("Sharon") and resold 299 cold rolled steel coils which Fabrique De Fer De Maubeuge of Louvroil, France ("Fabrique") ultimately purchased. The steel coils were shipped from Sharon's mill in Farrell, Pennsylvania overland by rail to Cleveland, Ohio where they were received for the account of Nimpex by Great Lakes International Corp. ("Great Lakes") during the period April 21-May 7, 1970 and stored outdoors under tarpaulins until arrival of the Polarland, for water shipment to Antwerp, Belgium (605a-712a, 772a). Nimpex' interest in the steel coils was insured by Travelers under a warehouse-to-warehouse, all-risk policy which attached ex mill, Farrell, Pensylvania (535a-543a). Nimpex issued a certificate of insurance covering the shipment which it endorsed in blank, which certificate ultimately was negotiated in due course to Fabrique (544a).

The Polarland, a bulk carrier with a summer carrying capacity of approximately 19,000 tons,* was owned by D/S A/S Vestland ("Vestland") and bareboat chartered to Molena Trust Incorporated ("Molena")** from 1967 through and including the events pertinent to this matter (172a-186a). Molena, prior to May, 1970, time-chartered the Polarland to Seven Seas (409a-410a). This time-charter

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* Approximately 14,000 tons of cargo can be carried by the Polarland into the Great Lakes and another approximately 5,000 tons can be added before or after transit in the Great Lakes.

** Molena, Nimpex, and Seven Seas at all times were affiliated corporations (86a, 403a-404a, 428a).

was cancelled to permit Molena to enter into a time-charter of the Polarland dated May 5, 1970 with Ferrostaal (" Molena/Ferrostaal Charter") (409a-410a). Simultaneously with the execution of the Molena/Ferrostaal Charter, Ferrostaal entered into an agreement with Seven Seas bearing the printed title "Uniform General Charter" the precise nature of which is a basic factor in the determination of this lawsuit ("Ferrostaal/Seven Seas Agreement") (592a-596a). That document provided for the shipment of various steel products for the account of Nimpex from various ports on vessels to be nominated by Ferrostaal during given periods of time at specific rates. Once a shipment schedule had been agreed, "Nimpex and/or Seven Seas" had the right to book outside cargo to eliminate dead freight. The pertinent clause stated as follows:

> "To be included it is understood in affreightment contract in the event *Charterers supplying mills*, for some reason cannot meet schedules to agreed upon that Nimpex and/or Seven Seas would have the right to book outside cargo in order to eliminate deadfreight, with the same terms and conditions to apply and to mean as though they were *Nimpex cargo.*" (594a) (emphasis supplied).

The italicized language clearly demonstrates that Nimpex steel products were the intended freight; in addition to the specific phrase "Nimpex cargo", the phrase "Charterers supplying mills" also had to mean Nimpex since, as Judge Weinfeld found, Seven Seas was engaged only in various aspects of the shipping business, and was not in the steel business (524a).

The Ferrostaal/Seven Seas Agreement contained the following additional pertinent clauses:

> "(2) Owners are to be responsible for loss of or damage to the goods or for delay in delivery of the

goods only in case the loss, damage or delay has been caused by the improper or negligent stowage of the goods (unless stowage performed by shippers or their stevedores or servants) or by personal want of due diligence on the part of the Owners or their Managers to make the vessel in all respects seaworthy and to secure that she is properly manned, equipped and supplied or by the personal act or default of the Owners or their Manager."

* * *

"12.(9) The Captain to sign Bills of Lading at such rate of freight as presented without prejudice to this Charterparty, but should the freight by Bills of Lading amount to less than the total chartered freight the difference to be paid to the Captain in cash on signing Bills of Lading."

* * *

"The cargo to be loaded, stowed, lashed and discharged by Charterers Stevedores free of expense to the vessel." (593a, 595a).

An undated and incomplete document purporting to be an agreement between Seven Seas and Nimpex, in the form of a "booking note" ("Seven Seas/Nimpex Agreement") (597a-602a) provided that Nimpex would ship about 6,000 tons of steel from Cleveland to Antwerp on the Polarland at the rate of $11 per ton free out.*

On May 11, 1970, the Polarland arrived at Cleveland and Great Lakes moved the Nimpex steel coils to the side of the vessel from where they were loaded and stowed during the period May 11-19, 1970 (751a-753a).

Great Lakes had noted and recorded on the dock receipts (either on the face of the dock receipts or on an attached

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* Pursuant to the Ferrostaal/Seven Seas Agreement, Seven Seas was to pay $10.25 per ton to Ferrostaal for freight for this shipment.

detail sheet) damage to most of the coils upon their receipt and initial unloading (605a-712a) all of which information was transferred onto the out-turn report, the mate's receipts, and, ultimately, the bills of lading (724a-728a, 751a-753a). The pertinent clausing of the bills of lading stated:

> "Outer wrappers athmosperically [sic] rust stained
> Outer wrappers slightly damaged
> Some bands damaged and/or missing" (724a, 726a, 728a).

Although none of the three bills of lading quantified the number of coils damaged, or more particularly specified the damage, the other underlying documents (dock receipts, mate's receipts) provided more detail.

Fabrique was notified of the damage to most of the coils. Accordingly it was required to effect an amendment of its letter of credit to permit payment against the claused bills of lading (767a-770a). Apparently no specification of the damage different from that indicated above was requested by or made available to Fabrique.

The bills of lading were signed by World Shipping, Inc. ("World"), a general agent at the port of Cleveland (421a, 777a). World had written authorization from the master of the Polarland to sign (778a), and, in fact, the actual signature read "World Shipping, Inc. as Agent only by authority of the Master." (724a, 726a, 728a). The individual who signed on behalf of World was John Reynolds, a Seven Seas employee.

Upon arrival of the Polarland and discharge of the 299 steel coils, a survey was held and 198 of the coils were found to be damaged (550a-587a). The cargo underwriter, justifying its actions on the survey results, sold 16 coils determined to be so ovalized as to be unfit by Fabrique for its intended use (although there was no firm evidence of such intended

use or why such coils couldn't be used by Fabrique) and made an allowance to Fabrique for the balance of the damaged coils (161a-164a, 590a). No evidence was proffered as to whether Fabrique resold or used these coils at full value or otherwise.

Seven Seas was not invited to, and did not, participate in the survey or negotiations relating to the allowance made by the underwriter with Fabrique.

The loss on the sale of the 16 ovalized coils together with the underwriter's allowance to Fabrique constitute the damages sought by Travelers in this case.

2. *Judge Weinfeld's Opinion.* The Court below concluded as a matter of law that "the documentary evidence abundently establishes that Seven Seas was the carrier of the coils" and "charterer" of the Polarland (515a, 523a, 526a). Based upon such conclusion (citing 46 U.S.C. § 1303(2)), the Court held that Seven Seas thereby was obligated to "properly load, handle, stow, and discharge the goods carried". Although unstated, the Court obviously concluded that this "carrier" for reasons of legal authority unknown, was somehow exempt from other obligations of a carrier in Sections 1303 (1) and (2) to maintain a seaworthy vessel, etc. and to "carry, keep, [and] care for . . . the goods carried."*

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* The Court failed to touch upon:

1. The fact that less than a full cargo load could be nominated under the Ferrostaal/Seven Seas Agreement (a full Great Lakes draft, which apparently was the basis for the freight price, permits loading of approximately 25% of the vessel's capacity before or after transit in the lakes);

2. The fact that cargo was placed on board the Polarland by parties other than Seven Seas and Nimpex (416a-417a); or

3. The fact that Seven Seas had no right to direct the passage of the Polarland, and the Polarland had "the liberty to call at any ports or ports in any order, for any purpose. . . ." (593a).

The Court below supported its conclusion that Seven Seas was the carrier by reference to the Seven Seas/Nimpex Agreement pursuant to which "Seven Seas would profit one dollar a gross ton" (516a) even though that agreement had no language relating to a "one dollar a gross ton" profit.

The Court below, as a basic premise (and seemingly as a matter of law), concluded that since World was a general agent of Seven Seas it would or could not be the agent for any other party in respect to this transaction (517a). As a result of this conclusion, the Court found that World *only* acted for Seven Seas and not for the Polarland (and its master) and concluded that Seven Seas and not the Polarland issued the bills of lading.*

The Court below, as a basic premise, concluded that the dock receipts only noted damage to 26 of the 299 coils when, in fact, there were exceptions as to virtually every coil. Further, the Court below held that the "damage was of a nature and source different from that noted on the dock receipts and bills of lading" (522a) even though those documents stated, for example:

> "coils wrapping rusty
> most chaffed
> contents unknown" (605a-712a)

and the written survey found rust, chaffing, etc.**

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* No evidence was offered that Seven Seas had the legal or delegated authority to do so; the only authority to issue the bills of lading was delegated by the Master of the Polarland to World (788a).

** The Court below made no inquiry to determine whether the damage on which the instant claim is based could have occurred during: the overland rail movement, unloading at the premises of Great Lakes, and the subsequent second overland movement to the side of the Polarland.

The Court below also concluded that the plaintiff Travelers, in a separate bi-partite agreement with Fabrique, could establish its own damages by making an allowance to Fabrique without any requirement of the Court that (i) there be any proof that Fabrique would incur or did in fact incur any loss; or (ii) there be any inquiry to determine whether there were special underlying circumstances that gave rise to the Travelers-Fabrique agreement.

Thus, the Court below held that Seven Seas: (a) was the carrier; (b) loaded the cargo improperly thereby causing damage to it; (c) issued the bills of lading for its own account; and (d) was liable for the cargo damages incurred as well as for reasonable counsel fees incurred by the Polarland in defending the action.

POINT I

Seven Seas Was Neither Carrier Of The Cargo Nor Liable For Alleged Damages To The Cargo

The District Court held that Seven Seas was the "carrier" of the Nimpex coils based upon:

1. "Documentary evidence" consisting of the Ferrostaal/Seven Seas Agreement, the Seven Seas/Nimpex Agreement*, and the bills of lading;

2. A finding that Seven Seas signed and issued the bills of lading on its own behalf; and

3. A finding that World and Great Lakes were the agent and stevedore, respectively, of Seven Seas and not of Ferrostaal or Nimpex.

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* This document was introduced into evidence at a time when Nimpex was a party plaintiff. Had it been introduced after Nimpex was dropped from the action, it would have been objectionable as irrelevant and immaterial to the claim for cargo damage. It is submitted that the Court's consideration of this document was an error.

We submit that a careful analysis of the documents, the actions of the parties*, and the applicable law demonstrates that Seven Seas cannot be liable to Nimpex (in whose stead Travelers stands) for any alleged damage to the cargo.

A. Seven Seas was not the "carrier"; Ferrostaal was the "carrier"

The right to carry goods in a vessel owned by another, or under contract from an owner to another, is generally called a contract of affreightment, Scrutton, *Charterparties & Bills of Lading*, § 1 (18th ed., Mocatta, Mustill, & Boyd eds. 1974). Contracts of affreightment can be for part of a vessel (*i.e.*, a defined portion or a specific number of tons) or for the entire vessel for a period of time (*i.e.*, a voyage or voyages). The word charterer is generally applied to a party who hires an entire vessel for a period of time. *Id.*

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* The Court below disregarded the testimony of the principal witness of Seven Seas. After doing so, it assumed actions by parties, and other facts without any support therefor in the record if the same were contrary to the testimony of such witness. Clearly, while the Court had power to do the former it had no power to do the latter.

We respectfully call the attention of this Court to an excerpt from the opinion of the Hon. David H. Edwards, Jr., after trial in the Supreme Court of the State of New York, County of New York, in *Himoff Indus. Int'l Corp.* v. *Seven Seas Shipping Corp.*, [not officially reported], 175 N.Y.L.J., p. 8., col. 2 (March 11, 1976) as follows:

> "This was a non-jury trial, the court therefore sitting as judge and jury. There were sharp conflicts of testimony between the opposing parties. The principal witness on behalf of the defendant, Seven Seas Shipping Corp., was its president, Captain Davy Jones. As fictional as the name may sound, Captain Davy Jones is a very real person, having been connected with shipping nearly all his life, over twenty-seven years at sea, thirteen years as a master mariner, and having worked ashore since 1952 as an operator and charterer of ships. He is a gruff, commanding, no-nonsense person, accustomed to taking charge, who says what he means and means what he says."

In the instant case, as a basic premise, but without any basis in fact or law, the Court below (in the third paragraph of the opinion) states that Seven Seas is "the charterer of the vessel", the Polarland. However, analysis of the facts discloses that the Polarland could load for the account of Ferrostaal approximately one-third more cargo after it exited from the Great Lakes and that, in fact, it loaded cargo for the account of Ferrostaal in a Great Lakes port other than Cleveland (416a-417a). Thus, it seems clear that in common usage Seven Seas was not the charterer of the Polarland.

Clearly, the Court below could not have determined that Seven Seas was the charterer merely by its designation as such in the Ferrostaal/Seven Seas Agreement, since the typed phrase "Charterers supplying mills" later in the same agreement unquestionably refers to Nimpex.

In any case, the pertinent question is whether Seven Seas assumed the risk of properly loading and stowing the cargo.

In the carriage of goods under a time or voyage charter, absent any special provision or circumstance, the duty to load, stow, and the risk thereof falls upon the ship and her owners. *Nichimen Co.* v. *M/V Farland,* 462 F.2d 319, 335 (2d Cir. 1972). Although this duty on the part of the carrier is non-delegable under COGSA, said duty may be assumed by a charterer. 46 U.S.C. §1303(2) (1970); *The Kaupanger,* 241 F. 702 (S.D.N.Y. 1917).

In the instant case the Polarland was operated by its owner, Vestland, in accordance with a management contract entered into between it and its bareboat charterer, Molena (784a). By clause 8 of the Molena/Ferrostaal Charter (759a), Ferrostaal specifically assumed the *risk* and expense of loading, stowing, and discharging of the cargo shipped on the Polarland, *Nichimen, supra,* 462 F.2d at 331.

In the Ferrostaal/Seven Seas Agreement executed by the same individuals and at the time as the Molena/Ferrostaal Charter, Seven Seas assumed the expense of loading, stowing, and discharging of the cargo but not the risk thereof. The provisions of the Ferrostaal/Seven Seas Agreement state that although Seven Seas bore the financial burden, unless this burden was passed on to a "shipper", the risk remained on the owner: "*Owners are to be responsible for loss of or damage to the goods* or for delay in delivery of the goods only *in case the loss, damage* or delay *has been caused by the improper or negligent stowage of the goods (unless stowage performed by shippers or their stevedores or servants). . . .*" (emphasis supplied) (593a).

We submit that Seven Seas had no risk of loss for damage caused by improper stowage since (a) if Seven Seas was the "shipper" then it could only have been as agent for Nimpex which would bear all responsibility, or (b) if Nimpex was the "shipper" then either Nimpex or Ferrostaal would bear all responsibility—if Nimpex performed the stowage, risk could have been on Nimpex, but if Seven Seas performed the stowage, the risk would have been retained by Ferrostaal.* Seven Seas under no circumstances assumed the risk for its own account for such loading and stowing and cannot be held liable for the damages incurred as a result thereof. *cf. Demsey & Associates, Inc.* v. *S.S. Sea Star,* 461 F.2d 1009, 1019 n. 3 (2d Cir. 1972).

COGSA provides that the responsibilities of a carrier are to: ". . . properly and carefully load, handle, stow, *carry, keep, care for,* and discharge the goods carried". 46

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* We submit that based upon these undisputed facts, Travelers is barred from suing both Nimpex and Seven Seas and the claim must be dismissed. *See, e.g., Atlas Assur. Co., Ltd.* v. *Harper, Robinson Shipping Co.,* 508 F.2d 1381 (9th Cir. 1975).

U.S.C. § 1303(2) (1970) (emphasis supplied). COGSA further provides that a "carrier" is responsible "to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship; [and]

(c) Make the holds, . . . and all other parts of the ship in which goods are carried fit, and safe. . . ." (46 USC § 1303(1) (1970)).

Inasmuch as the uncontroverted testimony and documentation was that Ferrostaal had the responsibility to carry, keep, and care for the cargo and had stood in the place of the owner as to the obligation to control the vessel, Seven Seas clearly did not have and could not have such duties with respect to the cargo or the vessel, and Seven Seas could not be the carrier. Such duties and control made Ferrostaal the carrier. *Southern Block & Pipe Corp.* v. *M/V Adonis,* 341 F. Supp. 879, 883 (D.C. Va.), *aff'd,* 457 F.2d 924 (4th Cir. 1972); *cf. Dempsey & Associates, Inc.* v. *S.S. Sea Star,* 461 F.2d 1009, 1019 n. 3 (2d Cir. 1972).

The only duties imposed on Seven Seas (or on Nimpex), to load, lash, and discharge the cargo, had to be duties delegated to it by the carrier, Ferrostaal, and we submit that such delegation did not carry with it the imposition of the responsibilities of a carrier on Seven Seas. Accordingly, Seven Seas is not liable for the alleged damage to the cargo.

B. Seven Seas did not issue the bills of lading; Ferrostaal issued the bills of lading

The court below held that Seven Seas issued the bills of lading relating to the damaged coils when its employee, Reynolds, signed them "World Shipping, Inc. as Agent only by authority of the Master". Neither documentary nor

any other proof supports this finding and, moreover, Seven Seas lacked the capacity so to do.

The power to sign a bill of lading originates with the owner of a vessel and its Master. In accordance with this general rule, the Molena/Ferrostaal Charter provided that the Master acting for the owner*:

> "8. . . . is to sign bills of lading for cargo as presented in conformity with mate's and tally clerk's receipts." (759a).

The power to sign bills of lading can be specifically delegated by the owner to another and in the instant case such power was delegated to Ferrostaal by Clause 35 of the Molena/Ferrostaal Charter**. Seven Seas was not a party to the Molena/Ferrostaal Charter, and, accordingly, cannot be held to have derived any authority thereunder. To the extent, therefore, that the Court below found documentary authority as the source of Seven Seas' capacity to sign a bill of lading, it had to be found in either the bills of lading themselves, the Ferrostaal/Seven Seas Agreement, or the Master's written delegation of authority to World to sign the bills of lading.

Since the bills of lading do not deal with this matter, logically the best source should be the Ferrostaal/Seven Seas Agreement which was executed simultaneously with the Molena/Ferrostaal Charter. But that agreement is silent as to any authority in Seven Seas to sign bills of lading. It seems fair to assume that Ferrostaal, having just received such authority from Molena, would have specified its further delegation to Seven Seas if it had intended to do so.

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* Molena was the disponent owner of the Polarland.

** "If required, by Charterers, the Master, the Charterers and/or their nominees or agents are hereby authorized by Owners to sign on Master's and/or Owners behalf, Bills of Lading. . . ." (762a).

The only other possibly relevant document to be considered is the written authorization from the Master to World to sign bills of lading (778a). Clearly, under Clause 35 of the Molena/Ferrostaal Charter, such delegation to World only could be in a capacity of agent or nominee of Ferrostaal. Accordingly, when World signed the bills of lading, it only did so on behalf of Ferrostaal.

The Court below improperly ignored an inquiry into World's capacity to sign, and directed its attention solely to whether World was the agent of Ferrostaal or Seven Seas. In so doing, the Court concluded that World was Seven Seas' agent. We submit that this approach was not only irrelevant (since World only could have authority to sign as Ferrostaal's agent), but erroneous.

The Court examined Clause 7 in the Ferrostaal/Seven Seas Agreement relating to agency* and held that the only meaning possible was that World was Seven Seas' agent. The purpose of this clause is to provide that the owner (or one acting in the place of the owner) appoint the vessel's agent at both ends of the voyage. Indeed Clause 7 provides that Ferrostaal was to pay for the expense of the agency. The variation in the Ferrostaal/Seven Seas Agreement was to permit Seven Seas—which had the primary interest in the quality of the agent who would handle the loading and unloading—to name the agent. Here Seven Seas named an agent with whom it was familiar for the account of Ferrostaal.** This is a common industry practice (424a-425a). The meaning of Clause 7 becomes clear when compared with Clause 44 of the Molena/Ferrostaal Charter executed simultaneously:

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* "7. In every case the Charterers ['Owner' crossed-out] shall appoint his own Broker or Agent both at the port of loading and the port of discharge. Owners paying customary Agency fee" (592a).

** In fact World handled all of the Polarland's representation at Cleveland and disbursed all of the vessel's expenses there as incurred.

> "44. Captain's co-operation with Charterers agents Captain on behalf of the Charterers to initiate efficient port dispatch of Vessel by co-operation with Charterers agents and in event of delay in port for any reason, lack or ready berth or facilities for maximum efficiency for loading and/or discharging, bunkering, weather, shortage of shore labour, barges, wagons, trucks, railcars causing or threatening to cause delay in loading or discharging, shortage of pilots, towboats, necessity for stevedores overtime to maintain schedule, Captain is to telegraph Charterers immediately to request instruction." (764).

F Judge Weinfeld to have correctly interpreted Clause 7 it is necessary to say that Molena, Ferrostaal, and Seven Seas agreed that: Molena would cooperate with Ferrostaal's agent (Clause 44), who is Seven Seas' agent (Clause 7). A sounder interpretation, we submit, is that under Clause 44 *and* Clause 7, the agent is Ferrostaal's—even though possibly named by another (Seven Seas). Thus, even under Clause 7, World was Ferrostaal's agent, and it signed the bills of lading for Ferrostaal's account.

This view not only was supported by the testimony of Captain Jones but also by an independent witness (testifying under subpoena), Mr. Gregg, an officer of Great Lakes (*e.g.*, 422a-425a, Tr. 248-9*).**

Judge Weinfeld, in holding that the bills of lading were issued by Seven Seas, stressed that the original bills of lading were signed by "J. Reynolds" (523a), who admittedly was an employee of Seven Seas. Clearly, however, if Seven Seas had no authority to sign these bills of lading, Mr. Reynolds could not have been acting for his

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* Reference to original transcript.

** This Court should further note that Seven Seas used its own form of bills of lading when acting on its own account but in the instant case, uniform bills of lading were used (449a-450a).

employer. In fact, he did not purport to do so since he signed in the name of World without reference to Seven Seas. Further, any authority which Reynolds had in this matter only could have come to him from World. Since, as demonstrated above, World only could have acted for Ferrostaal, the bills of lading must be attributed to it. The decision of the Court below to the contrary is in error.

C. The Seven Seas/Nimpex Agreement does not provide a basis for imposing liability upon Seven Seas

The Court below relied, seemingly to a material extent, on the Seven Seas/Nimpex Agreement in finding that Seven Seas was the "carrier" of the subject coils.* We submit that such reliance is unjustified; a proper analysis leads to the conclusion that that agreement had no legal significance.

At the outset, it must be noted that plaintiff's witness, a Nimpex employee (Martin Resnick), could not confirm that the Seven Seas/Nimpex Agreement which was referred to as a "booking note" was executed by Nimpex (91a-92a). In addition, and more significantly, the "booking note" neither matches the transaction nor the description thereof contained in the opinion of the Court below. Demonstrably, the shipment of the coils was in accordance with the Ferrostaal/Seven Seas Agreement and an oral arrangement made between two affiliated corporations—Seven Seas and Nimpex. The undisputed facts were:

1. Nimpex shipped about 3,000 metric tons of steel coils on the Polarland—the booking note referred to an agree-

* As noted above, the Seven Seas/Nimpex Agreement was placed in evidence at a time when Nimpex was a party plaintiff. If it had been introduced at a later date, its admission would have been objectionable.

ment to ship "[a]bout 6000 metric tons" (597a) [Note that the Court below obfuscated the difference in the tonnages of freight to be shipped by stating that the Seven Seas/Nimpex Agreement provided "that a *quantity* of steel coils would be carried . . . on board the S. S. Polarland" (emphasis supplied)].

2. Nimpex paid the freight charges after shipment—the booking note required freight to be "prepaid" (597a).

3. Nimpex paid a freight rate of $11.25 per ton—the booking note fixed the freight rate at $11.00 per ton (597a). [Note that the Court below stated that the booking note provided that "Seven Seas would profit one dollar a gross ton, the difference between the freight rate it was required to pay to Ferrostaal and what Nimpex paid to Seven Seas under the respective agreements."* (516a)].

4. Nimpex paid for the loading and stowing—the booking note specifically strikes out the clause which would have put this obligation on Nimpex (598a).

5. The booking note provisions were not incorporated in the bills of lading—the booking note required this to be done (602a).

Further, the booking note was incomplete [there was no date and the "PROTECTIVE CLAUSES" (¶ 10 at 602a) referred to were not attached] and there are totally inexplicable variations between the Ferrostaal/Seven Seas Agreement and the Seven Seas/Nimpex Agreement (Seven Seas was obligated to pay demurrage of $3,000 per day, but Nimpex' obligation was fixed at $2,500; Ferrostaal was obligated to

* This sum could hardly be a "profit" as determined in the Court below since Seven Seas paid all of its own costs of personnel, travel, etc.

load at the rate of 3,000 tons per day, but Seven Seas at the rate of 4,000 tons per day). *Compare* 592a and 595a *with* 598a.

Every available fact points to the unescapable conclusion that Seven Seas and Nimpex acted solely under the Ferrostaal/Seven Seas Agreement wherein Nimpex was the disclosed principal and Seven Seas the agent for a consideration of $1 per ton* and that the Seven Seas/Nimpex Agreement was a nullity. This conclusion is buttressed by the provision in the Ferrostaal/Seven Seas Agreement concerning dead weight which refers to the cargo to be carried as "Nimpex cargo" and is based upon the inability of "Charterers supplying mills" [obviously a reference to Nimpex] to meet shipping schedules. *See* p. 5, *supra.*

Therefore, in our opinion, the rights of the parties as to the damage to the coils are to be determined under the Ferrostaal/Seven Seas Agreement wherein Ferrostaal is the "carrier" and has the risk of damage. Alternatively, if the risk is on the shipper under Clause 8 because it improperly and negligently stowed the cargo, that shipper is Nimpex. Under either circumstance, the District Court's finding of responsibility on the part of Seven Seas was erroneous.

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* In this instance, as throughout the analysis of the Court below, if the Court did not accept the testimony of Seven Seas' principal witness, it accepted as factual the opposite of his testimony *without* any other supporting evidence.

POINT II

The Plaintiff Failed to Establish That It Was Damaged

A. The damage was pre-loading and adequately noted on the bills of lading

The Court below, held that "[w]hatever the merits of the parties' respective positions, it is clear that their rights and duties are governed by the Carriage of Goods by Sea Act .... [and] plaintiff to establish a prima facie case must prove that the shipment was delivered aboard the SS Polarland . . . in good order and condition except for the dock receipt notations as to . . . (26) coils . . . and that when delivered the damage sustained was of a nature, source and extent different from that noted on the dock receipts and bills of lading." (518a).

An examination of the record below clearly shows that this burden was not met by plaintiff, and that the exceptions noted were far more extensive than the Court below indicated.

1. *The "handling" damage was pre-loading and properly noted*

The Court below in awarding Travelers the entire amount claimed for "handling" damage, found that the dock receipts noted surface rust, paper covering torn, and "chaffed" coils but that these notations applied to only 26 coils (516a).* This finding is incorrect and incomplete; the dock receipts and the handwritten receiving reports appended to them indicate that at least 136 specific coils suffered some pre-loading damage, and, the outward cargo list prepared by Great Lakes and receipted by the Polarland, noted for *all* the cargo:

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* The Court apparently gave no reduction in damages with regard to the 26 coils it conceded to have been so damaged.

> "Coil wrappings rusty[,] chaffed condition— contents condition unknown. Some bands broken[,] edges dented and bend [sic]." (751a-753).

The bills of lading stated:

> "Outer wrappers athmospherically [sic] rust stained
> Outer wrappers lightly damaged.
> Some bands damaged and/or missing." (724a, 726a, 728a).

Similar comments appear on the survey of Travelers' surveyor in Antwerp, Mr. Heureux, on whose testimony the Court below appears to have based its findings (550a-587a). For this Court's assistance we have prepared and include as Addenda A and B to this brief a summary of the nature of damages noted on the dock receipts and the number of coils to which such damage was applicable.

Mr. Heureux clearly indicated that the damage noted on the bills of lading and other documents was sufficient to describe the "handling" damage he found at unloading (218a-221a) and that it was impossible to ascertain further damage to the coils without removing the wrappers (221a). Both the Polarland's and Seven Seas' expert witnesses concurred (345a-346a, 350a, 354a, 382a-383a). The expert witnesses also agreed that they did not know how or when such damage was occasioned except that it must have occurred during handling (157a, 337a, 396a-397a).

It seems self-evident that the coils were "handled" several times. Since the coils: left the originating mill, were placed in railroad cars and moved to Cleveland; were unloaded; were moved again to the side of the vessel; and were then loaded into the vessel, the place where handling damage occurred is not clear. *No proof was offered as to where this damage occurred* and clearly Travelers failed to meet its burden in this regard.* In fact, the proof of-

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* The opinion of the Court below did not discuss how the handling damage occurred, restricting its comments to the ovalized coils.

fered (the claused bills of lading, etc.) prove the opposite, that the handling damage was pre-loading. Fabrique was put on notice of the handling damage, and it appropriately amended its letter of credit to allow payment against the claused bills of lading. Fabrique did not limit its amendment of the letter of credit to any specific damage or any specific number of damaged coils; it agreed that payment in full for damaged coils as noted was acceptable* (770a-771a).

The conclusion is inescapable—the Court below did not find, and there does not exist, any proof to support Travelers contention that the "handling" damage solely was incurred in loading and stowing.** Therefore, the Court's award of damages against Seven Seas in this regard was erroneous.

2. *The ovalization damage was pre-loading and properly noted*

We further submit that plaintiff failed to prove a prima facie case as to the ovalization damage.

The substance of Travelers' evidence as to ovalization damage was (i) testimony by a surveyor as to the extent of the damage he observed at the unloading survey, and (ii) the *opinion* by the same expert as to the probable cause of such damage. He acknowledged that the bills of lading were claused and that, in fact, ovalization could have been a result of the "handling" damage noted pre-loading,

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* Fabrique, in fact admitted that the reservations on the bills of lading gave it sufficient notice to know that it would have to make a damage claim for damages done pre-loading. Yet the Court apparently gave no reduction in damages even with regard to this admission (316a).

** Judge Weinfeld, himself, during the redirect examination of plaintiff's surveyor commented: "I am aware there is no proof of the condition in which they [the steel coils] were found upon the outturn, . . . [as compared to] the condition on which they were placed on board the vessel." (217a).

aggravated during transport by the normal rolling of the ship (158a-159a). Of course, this expert had not conducted the out-turn survey at Cleveland and had not observed the coils at the time of loading (118a, 157a).

The issue then presented becomes clear, —were the steel coils "ovalized" at the time of loading, in whole or in part, as found on unloading. Since the bills of lading were claused at time of issuance, Travelers had the burden to prove there was a change in the condition of the coils from loading to unloading. No such evidence was produced by Travelers and the Court erroneously excluded evidence of the damaged condition at the time of loading (362a-368a, 444a-449a, 772a).

Both plaintiff's surveyor and the Polarland's expert agreed essentially that coils with either loose or missing internal bands or which were improperly wound during manufacture would become ovalized during normal transit unless such coils were stowed on top (341a, 350a-351a). However the testimony of all the experts at trial agreed that it could not be determined whether internal bands were loose or broken without removing the outside wrapper (*e.g.*, 215a, 221a, 346a-347a, 352a-354a). As previously noted the outside wrappers were not removed and the bills of lading were noted "Contents—condition unknown"—and no proof was offered that Seven Seas had a duty to open the wrappers to inspect the coils before stowage. Yet Seven Seas was held negligent for failure to properly stow these coils, when it was admitted that it neither knew nor had an obligation to find out whether internal bands were loose or broken or the coils improperly wound during manufacture. Thus, the Court below charged Seven Seas with improper stowage when it had no reason to know the stowage was improper.

Given the limited nature of the notations normally made on bills of lading (*i.e.* that they describe external appear-

ance only), it is clearly proper under COGSA to show the full extent of the items intended to be included by such notations by evidence demonstrating the actual condition of the cargo at loading, *Nichimen, supra; The Niel Maersk,* 91 F.2d 932 (2d Cir.), *cert. denied,* 302 U.S. 753 (1937), *E.T. Barwick Mills, Inc.* v. *Hellenic Lines, Ltd.,* 331 F. Supp. 161, 164 (D. Ga. 1971), *aff'd,* 472 F.2d 1406 (5th Cir. 1973); *J. Gerber & Co.* v. *Holland-Amerikalijn,* 261 F. Supp. 893, 876 (D. La. 1966); *F. Badrena E. Hijo, Inc.* v. *The Rio Iguazu,* 182 F. Supp. 885, 891 (D. La. 1960). Such evidence, an unloading survey, was produced during the deposition of Mr. Gregg of Great Lakes, but Judge Weinfeld refused to admit it (362a-368a, 444a-449a, 772a), despite the Judge's admission of Mr. Gregg's testimony concerning this document (281a) and despite the claim that such survey came from Great Lakes' regularly maintained files.

This survey noted "distortion of the core" and, apparently, telescoping "from 0 to 2", comparable to the ovalization noted at unloading by Travelers' expert (151a-153a, 772a).

We submit that Travelers failed to prove, prima facie, either that the shipment was delivered aboard the Polarland in good order and condition, or that the stowage was improper under the circumstances, or that the damages sought were of a different nature, source, extent, and character from those noted on or before loading. *See generally, Monarch Indus. Corp.* v. *Amer. Motorist Ins. Co.,* 276 F. Supp. 972, 982-86 (S.D.N.Y. 1967). The Court's conclusion, therefore, that the damage noted on unloading ". . . was of a nature and source different from that noted on the dock receipts and bills of lading. . . ." (522a) was unsubstantiated and erroneous. Moreover, under any circumstance the Court failed to give credit either for any preloading damage, or for "normal" losses expected for a shipment of steel.

B. The damage was not properly measured or proven

Travelers also failed to meet its burden to prove its claimed loss. The proper measure of damages on goods shipped CIF is "the difference between the market value that the goods would have had on arrival, if undamaged, and their value in the damaged condition." Scrutton, *Charterparties & Bills of Lading*, 397 (18th ed., Mocatta, Mustill, & Boyd eds. 1974); *Encyclopedia Britannica, Inc.* v. *S.S. Hong Kong Producer*, 422 F.2d 7, 18 (2d Cir. 1969), *cert. denied, sub. nom. Universal Marine Corp.* v. *Encyclopedia Britannica, Inc.*, 397 U.S. 964 (1970); *cf. A. Levatino & Sons Fruit & Produce, Inc.* v. *S.S. Athinai*, 388 F. Supp. 888, 891-2 (S.D.N.Y. 1975). No proof was offered as to the undamaged value of the cargo at Antwerp. The only testimony as to landed value indicated that the market was falling between the time Nimpex made the sale and the time the goods arrived (102a-103a, 141a).

Although plaintiff's surveyor testified that his award for "handling" damages to Fabrique was fair, it clearly was a negotiated amount and, by inference, not related to the proof of damages required at law (134a, 140a, 141a, 161a, 225a, 587a) since he admitted that he had no knowledge of market prices. Ovalization damage also was improperly awarded. Again no attempt to ascertain sound market value at landing was made (161a, 225a). The sale of the ovalized coils appears to have been several weeks after landing (587a) without reference to or allowance for any drop in market price.

While Judge Weinfeld placed heavy emphasis upon Mr. Heureux' testimony that the extent of the damage could not be properly determined except by on-site inspection, his testimony indicates that he only looked at the outside of the coils, never opened them up to determine the extent of

the damage, [illegible] er sought to obtain any estimate as to reconditioning costs, and never had them unwound to determine if they were damaged throughout. Indeed, Mr. Heureux appears to have simply accepted the consignee's agent's statements that the ovalized coils were unusable, without any attempt at verification (140a, 225a-226a).

We submit that absent such evidence, Judge Weinfeld's acceptance of the damage figures claimed was improper. The evidence strongly suggests that these large gaps in the proof led to a serious overestimation of damages (371a-376a, 380a, 383a, 385a).

In view of the testimony that the steel appeared fit for normal uses (360a, 371a-372a, 381a), it was incumbent upon Travelers to prove that its claimed damages met the long-established test. There was in fact evidence that at least several of the coils were used by Fabrique as intended, and without loss (587a). Travelers never proferred any firm proof that any of the steel coils had diminished value to Fabrique or that Fabrique suffered any economic loss as a result of the alleged damage.* There also was evidence that at least some of the damage was considered normal, acceptable and not an interference with end use (360a, 371a-372a, 381a). *Weirton Steel Co.* v. *Isbrantsen-Moller Co., Inc.*, 126 F.2d 593 (2d Cir. 1942) mandates that under such

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* Travelers did depose an employee of Fabrique but he was unable to supply specific information as to the damage:

"Q. Were any records kept in the manufacturing department as to how much of a loss of material resulted from the damage to those coils?

"A. I would be rather surprised if we still had that information, but I do not think so.

"Q. I asked the question, did the manufacturing department keep any records of any possible loss of this material at that time?

"A. I cannot reply to that, I do not know anything. (Tr. at 303).

circumstances, the maximum damage is the cost to recondition. *cf. Levatino, supra.* Moreover, because the cargo was steel some part of the damage, *i.e.,* atmospheric rust, was clearly not recoverable as an inherent vice, 46 U.S.C. § 1304(2)(b)(m) (1970); *Demsey & Associates, Inc.* v. *S.S. Sea Star,* 461 F.2d 1009, 1015 (2d Cir. 1972). Plaintiff failed to distinguish this damage.*

The Court below also failed to consider the terms of the policy under which Travelers paid Fabrique or whether there were other motives for the settlement made.

As previously noted, the Travelers' policy afforded all-risk, warehouse-to-warehouse coverage, which attached ex mill, Farrell, Pennsylvania. Clearly, under the circumstances, it was irrelevant to Travelers where the damage occurred. Further, the fact that Travelers is attempting to recover the full amount it paid Fabrique is not binding on the Court. As was stated in *Weirton Steel Co.* v. *Isbrantsen-Moller Co., Inc., supra*:

> "The fact that the underwriter agreed to pay the full amount claimed by the Texas Company is not material; for all we know, he may have thought it worth while to keep the good-will of an important customer." (*Id.* 126 F.2d at 595).

Essentially, the Court below abdicated its responsibility to determine the extent of the damage by accepting the amount of the claim paid by Travelers to Fabrique without regard to any inquiry as to the circumstances thereof.

Thus Travelers' claim for damage must fail as the claims were not proven.

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* Mr. Heureux may have been influenced by the fact that the insurance policy directs that the insurance payment shall be made *without* deduction "of normal loss" (542a, ¶ 44).

POINT III

The Polarland Was Not Entitled To Recover Legal Fees From Seven Seas

The Polarland was awarded $10,000 for legal fees incurred by it in the defense of this action.

We submit that such award failed to meet the well-established test that absent overriding considerations of justice, legal fees will not be awarded as damages.

In *Demsey & Associates, Inc.* v. *S.S. Sea Star,* [not officially reported], 1974 A.M.C. 838 (S.D.N.Y. 1973), *aff'd,* 500 F.2d 409 (2d Cir. 1974), the Court was confronted with a situation of cargo damage somewhat similar to the instant case, with the exception that in *Demsey* one of the stevedores was a party defendant.

In *Demsey* the vessel was time chartered under the same form of time charter (New York Produce Exchange form) as used herein, including clause 8 which provided for the cargo to be loaded, stowed, and discharged by the Charterer. The time charterer subsequently voyage chartered the vessel to a co-defendant. That voyage charter provided that the charterer was to assume the expense and *risk* of the loading, stowing, and discharging.

In this case Seven Seas did not assume the risk of such loading, stowing, and discharging but only assumed the expense thereof which, as pointed out above, was for the account of Nimpex.

In *Demsey,* after considering applications for legal fees by the owner and time charterer against the stevedore and voyage charterer, Judge Bonsal started with the premise that:

> "In the absence of a statute or an enforceable contract, attorneys' fees are not ordinarily recoverable as damages or as reimburseable costs. *Fleischmann*

> *Distilling Corp.*, vs. *Maier Brewing Co.* 386 U.S. 714 (1967), [*The*] *Baltimore* 75 U.S. 377 (1869); *Grace* vs. *Ludwig*, 484 F. (2d) 1262, (2 Cir., 1973). However, in special circumstances attorneys' fees have been awarded when overriding considerations of justice required such a result, *Fleischmann Distilling Corp., supra; Vaughan* vs. *Atkinson*, 369 U.S. 527, 1962 A.M.C. 1131 (1962); *Grace, supra.*" (*Id.* 1974 A.M.C. at 840).

and concluded, citing *Consolidated Cork Corp.*, v. *Jugoslavenska Linijska Plovidba*, [not officially reported], 1971 A.M.C. 1193 (S.D.N.Y. 1970), that overriding considerations of justice did not compel an award.

The Court of Appeals reviewed Judge Bonsal's opinion and affirmed the denial of counsel fees. *Demsey & Associates, Inc.* v. *S.S. Sea Star*, 500 F.2d 409 (2d Cir. 1974). The Court reviewed all applicable precedents and held that an award of counsel fees was not mandatory, but discretionary:

> "In indemnity cases, the courts have regularly required the indemnitor to reimburse the indemnitee for the costs of defending the original suit, and the appellants argue that this case is just one of these common garden variety of indemnity cases. Thus, we are told that if a longshoreman is injured and sues the shipowner for unseaworthiness and the shipowner asserts a third party claim against the stevedore who created the unseaworthy condition, the shipowner who loses after defending the action may generally recover the costs of defending the lawsuit because the stevedore breached his express or implied guarantee of workmanlike service and thus in effect agreed to indemnify the shipowner. We are also told that the same principle applies to cargo damage cases. These references lead up to an extensive discussion of the theoretical basis for such recoveries. Are they part of the damages for breach of the contract of indemnity? Are such recoveries

> discretionary? Paliaga v. Luckenbach Steamship Company, 301 F.2d 403 (2d Cir. 1962); Massa v. C.A. Venezuelan Navigacion, 332 F.2d 779 (2d Cir.), cert. denied, 379 U.S. 914, 85 S. Ct. 262, 13 L.Ed. 2d 186 (1964). Does Judge Cannella's ruling in Consolidated Cork Corporation v. Jugoslavenska Linijska Plovidba, International Terminal Operating Co., Inc., and the M/V Slovenija, 1971 A.M.C. 1193 (S.D. N.Y. 1970), apply to the effect that to justify the exercise of discretion in favor of attorney's fees the court must find some " 'overriding considerations of justice' which compel awarding attorney's fees?" (*Id.* 500 F.2d at 411).

The Court concluded by denying legal fees on the grounds that such award "would be unconscionable and a gross miscarriage of justice." *Id.*

As in *Demsey* there are no contractual or statutory obligations between the Polarland and Seven Seas which mandate Seven Seas to pay legal fees and there is no basis for a claim against Seven Seas of breach of implied warranty. Further, there are no equitable considerations present herein which demonstrate "overriding considerations of justice" which would support the granting of legal fees to the vessel as against Seven Seas.* In fact, the opinion of the Court below does not indicate that the Court made any determination requisite to a finding of liability for legal fees; the opinion simply states that since Seven Seas caused the vessel to be liable *in rem*, Seven Seas is liable for "reasonable counsel fees incurred [by the Polarland] in the defense of the action." (527a).

We submit that the award of legal fees to the defendant Polarland was erroneous.

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* The Court in fact chided all of the lawyers involved in this case, both plaintiff's and defendants', for the inexcusable waste of time and lack of preparation evidenced (*e.g.*, 367a-368a, 453a-454a, 457a).

CONCLUSION

1. Seven Seas was not the "carrier" of the cargo allegedly damaged and, therefore, Seven Seas was not liable as such for the alleged damage to the cargo.

2. Seven Seas did not issue the bills of lading and, therefore, Seven Seas was not liable for the alleged damage to the cargo as a result thereof.

3. Seven Seas did not have the risk of damage arising from the loading and stowage of the cargo.

4. The plaintiff failed to sustain its burden of proving that its damage was of a different nature, source, and character from that noted at the time of loading provided, that even if plaintiff is held to have met this burden it failed to prove its damage by accepted admiralty standards.

5. The award of counsel fees was not justified.

The judgment should be reversed in all respects.

Dated: New York, New York
March 15, 1977

Respectfully submitted,

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ADDENDUM A

Steel Coils—Damage Notations
(Information extracted from plaintiff's
Exhibit 18, 605a-712a)

Definitions:

Chaffed Coil ("C")
Coil Wrappings Rusty ("R")
Contents Unknown ("CU")
Dock Receipt ("DR")
Receiving Record ("RR")

Railroad Car No.	*No. of Coils*	*Type of Damage Notation*	*Where Noted (Source)*
PC 752732	10	R, C, CU	DR
EL 15921	8	R, C, CU	RR
EL 9039	8	R, C, CU,	RR
		"Clause"*	DR
EL 15926	9	R, C, CU	RR
EL 9038	8	R, C, CU	RR
		Clause	DR
EL 17712	8	R, C, CU	RR
		Clause	DR
EL 9100	8	R, C, CU	RR
		Clause	DR
EL 17763	8	R, C, CU	RR
EL 15909	9	R, C, CU	RR
		Clause	DR
EL 9063	10	R, C, CU	RR
EL 15942	10	R, C, CU	RR
		Clause	DR
EL 9047	8	R, C, CU	RR
EL 9084	10	R, C, CU	RR
EL 9024	8	R, C, CU	RR

* The term "Clause" is hardly unknown to the trade. Plaintiff's own expert agreed that it is a short-hand way of stating that the bills of lading noted damage (184a-185a).

ADDENDUM A—(Cont'd)

Railroad Car No.	*No. of Coils*	*Type of Damage Notation*	*Where Noted (Source)*
EL 9026	8	R	RR
EL 9022	10	R	RR
		Clause	DR
EL 15999	6	R	RR
EL 15902	8	R	RR
		Clause	DR
EL 15932	10	R (6 "slight" 4 "heavy")	RR
EL 15929	8	R (7 "heavy" 1 "slight")	RR
EL 9043	8	None	
CTO 306302	11	Clause	DR
EL 9021	8	R	RR
EL 15910	8	R	RR
		Clause	DR
EL 15972	6	Rust	RR
		Clause	DR
EL 15995	6	R	RR
		Clause	DR
EL 15936	10	R, C, CU	RR
PER 387050	8	R (Paper covering torn Uncovered car)	RR DR
PER 387151	8	"S/R, P/CT, OTC"	DR
		R	RR
PC 600530	7	R	RR
RDG 34127	8	R	RR
		Clause	DR
RDG 34017	8	R	RR
		Clause	DR
PRR 385413	8	R	RR
PRR 377217	8	R	RR
P&G 36723	8	R	RR
PC 601227	7	R	RR

Chafed Coils=136

ADDENDUM B

Steel Coils—Damage Notations
(Information extracted from defendant Polarland's Exhibit D, Outward Cargo Manifest [Mate's receipt], 751a-753a)

All coils noted as "Some bands broken edges dented and bend [sic]" with the possible exception only of the following:

PC 752732	10	Coil Wrappings Rusty Chaffed Condition Contents condition unknown
EL 15929	8	" "
PRR 387050	8	Surface Rust Paper Covering Torn Uncovered Car
PRR 387151	8	" "
PC 600530	7	" "
RDG 34127	8	" "
	49	

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Atty - Appellee

Attorneys for

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